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07 UNITED STATES DISTRICT COURT
08 WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

09 GREGORY JAMES REAP,) CASE NO. C04-2444-MJP
10)
11 Petitioner,)
12)
13 v.)
14) REPORT AND RECOMMENDATION
15 MAGGIE MILLER-STOUT,)
16)
17 Respondent.)
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22)

23 INTRODUCTION AND SUMMARY CONCLUSION

24 Petitioner is a state prisoner currently confined at the Airway Heights Corrections Center
25 in Airway Heights, Washington. He seeks relief under 28 U.S.C. § 2254 from his 2002 conviction
26 in King County Superior Court. Respondent has filed a motion to dismiss petitioner's petition as
untimely under 28 U.S.C. § 2244(d)(1)(A). The Court, having reviewed petitioner's petition,
respondent's motion, and the balance of the record, concludes that petitioner's federal habeas
petition should be dismissed, with prejudice, as untimely under 28 U.S.C. § 2244(d).

27 PROCEDURAL HISTORY

28 On December 10, 2001, petitioner pleaded guilty in King County Superior Court to a
29 charge of attempted murder in the second degree. (See Dkt. No. 10, Ex. 1.) On January 25,
30 2002, petitioner was sentenced to a term of 223.5 months confinement. (Id., Ex. 1 at 4.)
31 Petitioner was also ordered to pay restitution in the amount of \$23,391.05. (Dkt. No. 10, Ex. 1,

01 Appendix E.)

02 Petitioner did not file a direct appeal. Petitioner did, however, file a personal restraint
03 petition (“PRP”) in the Court of Appeals of Washington in June 2003, challenging the order of
04 restitution entered as a part of his judgment and sentence. (*Id.*, Ex. 3.) On July 2, 2003, the Court
05 of Appeals issued an order dismissing petitioner’s PRP. (*Id.*, Ex. 4.) The Court of Appeals
06 concluded that petitioner had not stated grounds upon which relief could be granted by way of a
07 PRP. (*Id.*)

08 Petitioner next filed a petition for discretionary review in the Supreme Court of
09 Washington. (*Id.*, Ex. 5.) On August 25, 2003, the Supreme Court Commissioner issued a ruling
10 denying review. (*Id.*, Ex. 6.) The Commissioner expressly found that petitioner’s PRP was not
11 timely filed. (*Id.*) Petitioner subsequently moved to modify the Commissioner’s ruling. ~~*Id.*~~, Ex.
12 7.) Petitioner’s motion was denied on November 4, 2003. (*Id.*, Ex. 8.) On December 2, 2003,
13 the Court of Appeals issued a certificate of finality in petitioner’s personal restraint proceedings.
14 (*Id.*, Ex. 9.)

15 On December 2, 2004, petitioner signed his federal habeas petition. (Dkt. No. 4.) The
16 petition was received by the Court for filing on December 9, 2004. (*Id.*)

17 DISCUSSION

18 On April 24, 1996, the President signed into law the Antiterrorism and Effective Death
19 Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214, Sec. 105 (1996), which
20 worked substantial changes in the law of federal post-conviction relief. One of those changes was
21 to adopt a one year statute of limitations for § 2254 actions. *See* 28 U.S.C. § 2244(d)(1) (1996).
22 The one year limitations period starts to run from the date of the conclusion of direct review or
23 “the expiration of the time for seeking such [direct] review,” whichever is longer. 28 U.S.C. §
24 2244(d)(1)(A).

25 In this case the period for direct review ended, at the latest, upon the expiration of the
26 period for filing a direct appeal. Petitioner’s judgment and sentence was signed on January 25,

01 2002. Petitioner had thirty days after the entry of that order, or until February 25, 2002, to file
02 a direct appeal. *See* Rule 5.2, Washington Rules of Appellate Procedure. Because petitioner did
03 not file a direct appeal, his conviction became final on February 25, 2002. 28 U.S.C. §
04 2244(d)(1)(A). Petitioner therefore had until February 25, 2003, to file his federal habeas petition.


05 The one year limitations period is tolled for any “properly filed” collateral state challenge
06 to the state conviction. 28 U.S.C. § 2244(d)(2). Petitioner did file a collateral state challenge to
07 his judgment and sentence. However, he did not file that challenge until after the statue of
08 limitations had already expired. Petitioner’s personal restraint proceedings in the state courts
09 therefore would not have acted to toll the statue of limitations. *See Nino v. Galaza*, 183 F.3d
10 1003 (9th Cir. 1999).

11 The statute of limitations is also subject to equitable tolling. *Calderon v. United States*
12 *District Court (Beeler)*, 128 F.3d 1283, 1288 (9th Cir. 1997), *overruled in part on other grounds*
13 *by, Calderon v. United States District Court (Kelly)*, 163 F.3d 530 (9th Cir. 1998)(en banc).
14 However, the Ninth Circuit has made clear that “[e]quitable tolling will not be available in most
15 cases, as extensions of time will only be granted if ‘extraordinary circumstances’ beyond a
16 prisoner’s control make it impossible to file a petition on time.” *Calderon*, 128 F.3d at 1288
17 (citing *Alvarez-Machain v. United States*, 107 F.3d 696, 701 (9th Cir. 1997)). The Ninth Circuit
18 further explained in *Miles v. Prunty*, 187 F.3d 1104, 1107 (9th Cir. 1999), that “when external
19 forces, rather than a petitioner’s lack of diligence, account for the failure to file a timely claim,
20 equitable tolling of the statute of limitations may be appropriate.” Petitioner does not argue that
21 he is entitled to equitable tolling of the federal statute of limitations.

22 As noted above, petitioner did not sign his federal habeas petition until December 2, 2004,
23 over 21 months after the statute of limitations expired on February 25, 2003. Because petitioner
24 filed his petition outside of the § 2254 statute of limitations period, and because petitioner has not
25 demonstrated that he is entitled to either statutory or equitable tolling of the limitations period, his
26 petition is time-barred. This Court therefore recommends that respondent’s motion to dismiss be

01 granted and that petitioner's federal habeas petition be dismissed, with prejudice, pursuant to 28
02 U.S.C. § 2244(d). A proposed order accompanies this Report and Recommendation.

03 DATED this 11th day of April, 2005.

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06 Mary Alice Theiler
07 U.S. Magistrate Judge
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